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No. 98-482

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In The

Supreme Court of the United States

October Term, 1998

JOHN G. HANLIN,

Petitioner,

vs.

JERLE H. MARTIN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHRISTOPHER S. UNDERHILL, Esquire
Attorney I.D. #07013
HARTMAN UNDERHILL & BRUBAKER LLP
221 East Chestnut Street
Lancaster, PA 17602
(717) 299-7254
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Is the order of the Court of Appeals of the Third Circuit quashing Petitioner's appeal as interlocutory ripe for review by this Court?

2. Do the issues presented by Petitioner merit consideration by this Court?

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COUNTERSTATEMENT OF THE CASE

This case arises out of the breach of an agreement entered into by Petitioner and his mother, Merle E. Hanlin, on September 19, 1994, pursuant to which Petitioner promised to pay his mother the sum of $ 100,000.00 in installments, A copy of the Agreement is attached hereto as Appendix A. When Petitioner failed to make the payments as scheduled, suit was instituted against him in the Court of Common Pleas of Franklin County, Pennsylvania. Petitioner then removed the case to the U.S. District Court for the Middle District of Pennsylvania.

Merle E. Hanlin died on May 26, 1997. Mrs. Hanlin named Petitioner, her oldest son, executor of her estate. This put him, as the lower court noted, "in the curious position of legal representative of the Plaintiff in a lawsuit in which he, is also the Defendant." (Petitioner's Appendix A-2.) Since Petitioner was not about to pursue a case against himself on behalf of the estate, Mrs. Hanlin's other two children, Respondents, filed a motion with the lower court to have themselves substituted as Plaintiffs. As Petitioner correctly notes, Respondents sought to act "on behalf of the Estate of Merle E. Hanlin and on behalf of themselves." (Petition, p. 2) Respondents wish to act on behalf of the estate to recover whatever amounts had not been paid to their mother before her death and on behalf of themselves because Paragraph 3 of the Agreement provided that upon their mother's death, if the entire obligation had not been paid, the remaining payments were to go to them.

The District Court granted the motion pursuant to Federal Rule of Civil Procedure 25(c). That order was

appealed to the U.S. Court of Appeals for the Third Circuit. On a motion by Respondents the Third Circuit quashed the appeal on the grounds that it was interlocutory. (Petitioner's Appendix C.) Petitioner's petition for rehearing was denied, (Petitioner's Appendix D.) The Petition for Writ of Certiorari to this Court followed. This brief is written in opposition thereto.

REASONS FOR DENYING THE WRIT

I. The Order of the Court of Appeals for the Third Circuit Quashing Petitioner's Appeal as Interlocutory Is Not Ripe for Review by this Court.

Rule 11 of the rules of this Court provides as follows:

> A petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U.S.C. § 2101(e).

Rule 11, Rules of the Supreme Court of the United States.

This case is even weaker than a case contemplated by Rule 11. Not only has judgment not been entered in the Court of Appeals, the appeal has been dismissed. No reason has been advanced by Petitioner that constitutes, "a showing that this case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this

Court." It is submitted, therefore, that the Petition for Certiorari is simply premature.

II. The Issues Presented by the Petition for Certiorari Do Not Merit Review by this Court.

Petitioner appears to argue that this case falls under Rule 10(c), Considerations Governing Review on Certiorari, of this Court. Petitioner argues that the Third Circuit, "has decided an important federal question in a way that conflicts with the relevant decisions of this court." (Rule 10(c)) Petitioner argues that the decision of the Third Circuit to quash the appeal as interlocutory is in conflict with the decision of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Petitioner is mistaken in his understanding of *Cohen*.

Cohen governs, "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. In *Cohen*, a New Jersey statute provided that in stockholders' derivative suits plaintiffs could be liable for the reasonable expenses and attorneys' fees of the defense and could be required to post security before proceeding with the case. The lower court held that the state statute did not apply to stockholders' derivative suits in federal court. The court of appeals reversed. This Court affirmed. It is obvious that the posting of security is separate and independent from the merits of the case. It is also obvious that if the

question of security was not addressed at the outset of the case, and was delayed until the conclusion of the case, the protection of the corporate defendant would be lost.

Such considerations are not present in the instant case. The interests of the estate of Merle E. Hanlin and the interests of the Respondents are inseparable from the merits of the case. Respondents are the only persons with an interest in seeing the estate of their mother recover from their brother, the Petitioner. They also have an interest in recovering against their brother on their own behalf. Their claims are not, "separable from, and collateral to, rights asserted in the action." Their rights are central to the case. Moreover, they are the only persons, other than Petitioner, with standing to pursue the claims. It is inconceivable that Petitioner will pursue the case against himself.

In quashing the appeal, the Third Circuit cited *Bauer v. Commerce Union Bank*, 859 F.2d 438 (6th Cir. 1988). The *Bauer* case involved whether or not a trustee in bankruptcy should be substituted as plaintiff in a lawsuit brought by the bankrupts. The district court allowed the substitution. The Sixth Circuit affirmed stating, "other courts of appeals have held that orders substituting parties or permitting parties to intervene are interlocutory and non-appealable. *See, Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1325 (10th Cir. 1978); *In re: Sylvania Electric Products*, 220 F.2d 423, 424 (1st Cir. 1955); *7C C. Wright, A. Miller & M. Kane, Federal Practice Procedure*, Sec. 1962 (2d ed. 1986)." 859 F.2d at 440. Respondents submit that as in *Bauer* the order in this case substituting parties is interlocutory and nonappealable.

Petitioner also misstates the decision of the District Court. Petitioner repeatedly states that, "the order determines whether the property interests of Plaintiff Merle E. Hanlin under an agreement for payment of $100,000.00 ("Agreement") has been transferred to Respondents and is no longer asset of the Plaintiff and of her estate. . . . The order of the District Court resulted in immediate transfer of Plaintiff's property interest under the Agreement for $100,000.00 to Respondents." (Petition p. 7.) An examination of the District Court's opinion discloses that these statements are not true. The petition to substitute Jerle H. Martin and James E. Hanlin as plaintiffs specified two interests: (1) the interest of the Estate of Merle E. Hanlin in the amount due Mrs. Hanlin before her death on May 26, 1997, and (2) the interests of Jerle H. Martin and James E. Hanlin for amounts due them after Mrs. Hanlin's death.

This distinction was recognized by the District Court, The District Court held that Mrs. Hanlin's claim was not extinguished by her death. "Movants assert and Defendant does not deny, that Plaintiffs claim is not extinguished by her death. The court agrees." (Petitioner's Appendix, A-4.) However, because the agreement under which suit was originally brought provided that upon Mrs. Hanlin's death the remaining payments went to Respondents, they also had a direct interest in pursuing a claim against Petitioner. The lower court stated the following:

> Courts have found that an involuntary transfer of an interest by reason of the death of a party is to be analyzed solely according to Rule 25(c). (Citation omitted.) The transfer of interest

> in the instant situation, however, came about voluntarily due to the Agreement rather than solely by reason of Plaintiff's death. The Agreement provides for the transfer of Plaintiff's interest to Movants upon Plaintiff's death. The instant suit was filed prior to Plaintiff's death, and thus the transfer of interest to Movants occurred during the pendency of the suit. Therefore, the court finds Rule 25(c) the appropriate mechanism by which to substitute Movants for Plaintiff in the instant situation.

(Petitioner's Appendix, A-7-8.)

Respondents respectfully submit that none of the issues raised by Petitioner are issues worthy of consideration by this Court at this time. The case before the District Court should be allowed to continue and the issues resolved.

CONCLUSION

This case does not merit further review by this Court. For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

CHRISTOPHER S. UNDERHILL, Esquire
Attorney I.D. #07013
HARTMAN UNDERHILL & BRUBAKER LLP
Attorneys for Respondents

221 East Chestnut Street
Lancaster, PA 17602
(717) 299-7254

APPENDIX

THIS AGREEMENT

MADE the 19th day of September, in the year nineteen hundred and ninety-four (1994);

BETWEEN John G. Hanlin, First Party, AND Merle E. Hanlin, Second Party.

WITNESSETH: WHEREAS, First Party is the son of Second Party and is indebted to her in the amount of One Hundred Thousand ($100,000.00) Dollars;

AND WHEREAS, First Party and Second Party have agreed to settlement of this obligation in the manner hereinafter set forth.

NOW KNOW ALL MEN BY THESE PRESENTS, that First Party and Second Party, intending to be legally bound, agree as follows:

1. First Part will pay off the above obligation to Second Party in monthly installments of Three Thousand ($3,000.00) Dollars each, First Party to pay Second Party the sum of Three Thousand ($3,000.00) Dollars on October 1, 1994 and a like sum on the first (1st) day of each month thereafter until said obligation of One Hundred Thousand ($100,000.00) Dollars is fully paid.

2. As long as First Party complies with the terms of this Agreement, no interest will be due on this obligation.

3. Should Second Party die before the aforesaid obligation is fully paid, Second Party will continue payments thereon to Second Party's children, Jerle E. Martin and James E. Hanlin, in equal shares.

4. If Second Party has any debts at the time of her death, First Party shall fully pay the same, and should she not have resources to pay her funeral expenses, First Party shall pay the same.

This Agreement shall be binding on the heirs, executors, administrators and assigns of each party.

IN WITNESS WHEREOF, First Party and Second Party have caused this Agreement to be duly executed the day and year first above written:

WITNESS:

/s/ Illegible _____ /s/ John G. Hanlin _____ (SEAL)
John G. Hanlin First Party

/s/ Rudolf Wertime _____ /s/ Merle E. Hanlin _____ (SEAL)
Merle E. Hanlin Second Party